No. 1417

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE PACIFIC COLD STORAGE COMPANY, a Corporation,
Appellee.

vs.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, a Corporation,
Appellant.

FILED
FEB -4 1907
F. D. MONCKTON,
CLERK

BRIEF OF APPELLANT

IRA BRONSON
D. B. TREFETHEN
F. R. WALL.
Proctors for Appellant

614-618 COLMAN BUILDING,
SEATTLE, WASH.

No. 1417

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE PACIFIC COLD STORAGE COMPANY, a Corporation,
Appellee.

vs.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, a Corporation,
Appellant,

BRIEF OF APPELLANT

IRA BRONSON
D. B. TREFETHEN
F. R. WALL.
Proctors for Appellant

614-618 Colman Building,
SEATTL , WASH.

STATEMENT OF THE CASE.

This suit was brought by the appellee, The Pacific Cold Storage Company, against the appellant, the St. Paul Fire & Marine Insurance Company, to recover upon a general average adjustment based principally upon what is known as the sue and labor clause, in a policy of marine insurance issued by the appellant to the appellee upon a cargo of cold storage products, cannery supplies and produce on a voyage from Tacoma and or Seattle, Washington, to Dawson, Yukon Territory, on the ship or vessel Elihu Thompson and connecting steamers (not barges) against the following perils named therein, to-wit:—

"The seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter mart, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes and people of what nation, condition or quality soever, barratry of the master and mariners and of all other perils, losses and misfortunes that have, or shall come to the hurt, detriment or damage of the aforesaid subject matter of this insurance or any part thereof. And in case of any loss or misfortune it shall be lawful to the insured, their factors, servants and assigns, to sue, labor and travel for in and about the defense, safeguard and recovery of the aforesaid subject matter of this insurance or any part thereof without prejudice to this insurance, the charges whereof these said assurers will bear in proportion to the sum hereby insured."

This cargo included three hundred tons of hay and grain and about two hundred and ten tons of frozen meats and was laden on board of the Elihu Thompson in August, 1903, and arrived in St. Michaels on board said Thompson during the same month.

The two hundred and ten tons of meat were transhipped to the steamboat Robert Kerr and the hay and grain to a barge called the Peter.

S. S. Elihu Thompson and the Steamboat Robert Kerr and the barge Peter and all of the cargo belonged exclusively to the appellee, The Pacific Cold Storage Company. The Kerr took the barge Peter on her bow as a pushing tow up the Yukon.

The Kerr was a scow built steamboat about one hundred and eight feet long and thirty-eight feet beam, and when loaded, as she was with the cargo in question, drew four feet eight inches of water. She contained a cold storage plant and was of a similar build, dimension and capacity with the Steamer Light, built at the same time by the same shipbuilders, which vessel, carrying a heavier cargo left St. Michaels about the same time with the Kerr and not only reached, but passed and returned to Dawson during the fall of 1903. (See pages 617, 618, 635, 669-670 of Apostles.)

The boilers of the Kerr were those placed in her when built, and about four years old. See pages 295, 642, 670, 567, 591, 622 of Apostles.

The tubing of the boilers should be renewed every two years. Pages 488, 567.

Her boiler tubes were leaking on her way down the river, previous to undertaking the voyage in question. (See Log, and testimony of Stack, pages 614, 615, 616 and 637 of Apostles.)

There may be some evidence of their having been repaired previous to the time in question, but there is no evidence of their having been renewed and the undisputed testimony is, that the life of these tubes is about two years. (Pages 488, 567 of Apostles.)

There was some attempt made at repairing the tubes in St. Michaels previous to going up the river.

There was some evidence, although it was disputed, that the boilers, after the repair job, which consisted in rolling out and thinning the tubes, which must unquestionably have weakened them, were submitted to a cold water pressure of one hundred and fifty pounds.

This was evidently upon the theory that one hundred and fifty pounds of water pressure was equivalent to one hundred and fifty pounds of steam pressure, and that as the Kerr was supposed to carry one hundred and forty to one hundred and fifty pounds of steam pressure, that she was capable of carrying her normal steam pressure upon a test of one hundred and fifty pounds cold water pressure.

The evidence to which the Court's attention will be hereafter callel, shows that this leaking condition of the boilers was increasing and constant, all the way up the river, and was also the direct cause of the delays which finally resulted in suspending the voyage until spring, of which the appellee complains.

The Kerr, pushing the barge Peter as aforesaid, finally got away from St. Michaels on the last days of August, 1903.

On the 19th of September, the Kerr and barge having proceeded up to Fort Yukon it was determined that there was no chance of getting further up the river with the barge in tow. The Peter and her cargo were, in accordance with instructions received from the appellee, put into winter quarters at Fort Yukon. The cargo was cached and the following spring, after opening up of navigation, was taken to Dawson by the Kerr, this procceeding having removed part of the values which should contribute to a general average expense if there was any.

The Kerr and her cargo proceeded on up the river and grounded on Two-pipe Bar, about fifty miles below Circle City and thirty miles above Fort Yukon. While on this bar, an unsuccessful attempt was made by the steamboat Rock Island to pull the Kerr off.

The Kerr and her cargo remained on Two-pipe Bar for a week, and while there, Captain Smith, the master of the Kerr, decided that he could not get the Kerr and her cargo to Dawson unless there was a rise in the

river, and telegraphed to that effect to the appellee in Dawson asking them, also, to send down a light draft steamboat. In obedience to this telegram, the steamboat Lightning left Dawson on October 4th, 1903, having on board Mr. Bryant, the appellee's general manager for the Yukon. The Lightning procceeded down the river until she found the Kerr and her cargo aground on Twelve Mile Bar, about twelve miles below Circle City, the Kerr in the meantime having got off Two-pipe Bar and up the river as far as Twelve Mile. The Lightning took part of the Kerr's cargo to Circle City and the Kerr with the remainder of her cargo also arrived there.

At Circle it was decided by Mr. Bryant to put the Kerr into winter quarters at that place and to send to Dawson, by the Lightning and a barge, one hundred and nine tons of the Kerr's cargo.

About ninety-seven tons of refrigerator products were loaded on the Lightning, and about twelve tons on a barge, and the two started for Dawson on October 11th, 1903, the Lightning drawing not less than four feet of water. The Lightning had no refrigerator plant and part of the cargo was necessarily loaded in close proximity to that boat's boilers. The Lightning and the barge got as far as Washington Creek, about one hundred and eight miles from Dawson and about one hundred and twenty miles from Circle City, when they were caught in the ice of the Yukon on the 13th day of October. The Yukon between Circle City and Dawson usually freezes over between October 7th and October 20th. The cargo of the Lightning and barge was unloaded and cached at Washington creek.

Mr. Bryant got to Dawson about the 20th of October, and at once raised the price of meat: had he been there earlier, he would have raised the price at least ten days sooner than he did. (See Bryant's letters. Appellant's Exhibit 4 1, p. 713 Apostles.)

On the 31st day of October Mr. Bryant made a contract for the appelles with H. N. Ford to haul by sleds the one hundred and nine tons at Washington Creek for thirteen cents a pound, and fifty tons from Circle City for sixteen cents a pound, the libellant to receive half a cent rebate on products hauled from Washington Creek and one cent for those hauled from Circle City. This action is to recover the money paid out to Ford and to the owners of the Lightning, and part of the money paid to the Lightning for going to the Kerr's assistance.

The remaining forty tons of the Kerr's cargo remained on the Kerr in Circle City until after the break up in the Spring of 1904 when the Kerr took these forty tons to Fort Yukon, got the barge Peter and her cargo, and came up to Dawson with all of the aforesaid cargo, arriving there some time in May, 1904.

It is usual and expected that the water in the Yukon River will be low during the month of September, and all boats of any draft navigating the Yukon during this month are likely to ground on bars and to meet with delays because of low water; and particularly is this true as to the Yukon Flats, extending from Rampart to Circle City. Such delays are so much a part of every voyage during this season of the year, that every boat plying on the Yukon between St. Michaels and Dawson is fitted up with heavy spars and tackle for prying it off or over such bars, and also with wire cables for heaving them over. (See pp. 156-7, Apostles.) The lowest water on the flats during September, 1903, was four feet two and one-half inches, which was on Twelve Mile Bar.

The Kerr was the only boat leaving St. Michaels bound for Dawson that fall that did not get there before the freeze up. (See p.——)

The master of the Kerr was instructed by the appellee, in a letter written August 20th, 1903, that in

case any difficulty should be encountered in reaching Dawson with the Kerr and her cargo and the barge and her cargo, to leave the barge and her cargo behind and to come on with the Kerr and her cargo. (See respondent's Exhibit 4 C, p. 706.)

The meat market at Dawson fluctuates in prices with every arrival of meat. Besides the shortage in the month of October, due to the non-arrival of the Kerr and her cargo, a large consignment of live-stock that was being brought in by the upper river, was also delayed. If the Kerr's cargo had arrived as expected, the appellee could have had entire control of the market.

The above facts are taken almost entirely from the testimony of appellee's witnesses and letters filed herein. In addition there is much testimony produced by both sides as to whether or not Circle City is a safe place in which to lay a boat up for the winter. As a mater of fact, there is doubtless *no* place on the Yukon River in which a boat can be laid up so that she *may* not be in some danger during the Spring break up; but the appellee's manager said himself, at the time, that the Kerr was in as safe a place as she could be between Dawson and Circle City. She might have been put in a safer slough near Twelve Mile, below Circle, but Mr. Bryant overruled the master of the Kerr, who wished to winter her in this slough. Tested by the event, the Kerr was in safe winter quarters, as no material damage occurred to her or to that part of her cargo that remained at Circle City. Also, the Kerr has wintered in the Yukon River at Dawson with cargo on board of her and also in the Tanana River with cargo on board. (See Apostles pp. 104, 105, 106, 110, 111, 168.)

The appellant proved further, that the cargo could have been safely cached in cabins in Circle City or in the frozen ground or in artificial ice houses. The Kerr was in a safe place and there was ample means of protecting the cargo at hand. (See the evidence of Bowcher, a mem-

ber of the crew, Apostles pp. 193-194-196-197-203-204 and 205, where the witness on cross-examination says the appellee cannot point to a wreck at the place in question. Also Apostles pp. 211-213-215. See also evidence of Keenan, Apostles pp. 224 to 227; also pp. 251-252 and 255.)

The appellee, The Pacific Cold Storage Company, subsequently employed Mr. E. N. Alexander as an adjustor to adjust the amount due from the appellant herein to the appellee under the sue and labor clause.

The adjustment is set forth in the record herein, being appellee's Exhibit C, and seems to proceed upon the theory that the province of an adjustor is that of a court to determine the amount due upon what the adjustor fixed as liquidated damage, instead of the adjustment of a loss under the law as applicable to general average.

The record in this case shows that the appellee in the court below took the position of attempting to rely upon a general average adjustment by an ex-parte decision of the adjustor with reference to expenses incurred under the sue and labor clause, which are wholly foreign to a general average claim.

ASSIGNMENTS OF ERROR.

The appellant sets forth as Assignments of Error of the Court below as follows, to-wit:

1. That the award, in the sum of $29,728.90, together with interest from the date of filing the libel and costs and dismissing the cross-libel, said award and decree being made in favor of The Pacific Cold Storage Company, is contrary to the law and to the evidence in said cause.

2. In that the proper award in this cause depends

upon the particular facts in the case and those facts do not warrant the making of an award in favor of the said The Pacific Cold Storage Company, libellant and appellee, but that the said award should have been made in favor of the St. Paul Fire and Marine Insurance Company, respondent, cross-libelant and appellant.

3. In that the District Judge erred in entering a decree in favor of the said The Pacific Cold Storage Company and against the St. Paul Fire and Marine Insurance Company for the sum of $29,728.90 with interest from the date of filing the libel, and costs and dismissing the cross-libel of respondent.

4. That the District Judge erred in not directing a decree to be entered in favor of the St. Paul Fire and Marine Insurance Company, respondent, as prayed for in its cross-libel.

ARGUMENT.

The Appellant desires to present its argument under the following heads:

1. That an action to recover expenditures under the terms of the "sue and labor clause" is not an action within the cognizance of a Court of Admiralty, not being a part thereof, except as a side contract, not relating to, or to be performed upon, the sea. or analogous "to forwarding charges" as such.

2. That the cargo of the Kerr was not exposed to any peril under the terms of the policy, having merely been delayed, which, however inconvenient to the appellee, anxious to make a market, did not entitle the appellee to expend the full amount (or five-sixths thereof), of the value of the goods at our expense under the sue

and labor clause; said clause not being applicable to a case of remote and future peril, but to an immediate danger, or present loss, and not under any circumstances to a case of delay alone.

3. The appellant contends that the terms of the policy were invalidated by splitting up the voyage and separating the insurable risks, which should have all contributed to a general average loss, if any occurred, and by the refusal of the appellee, The Pacific Cold Storage Company, to sacrifice such part of the cargo as was necessary to enable the Kerr to proceed up the river, if any peril, or loss, did occur.

4. We submit that the policy in this case never attached to the goods shipped, because the Steamer Kerr was unseaworthy:

a. Both when the goods were loaded on the Elihu Thompson;

b. And when the goods were trans-shipped on board the Kerr;

And therefore at the inception of the voyage upon which the loss is alleged to have occurred, or at the inception of a second stage of the voyage, if it is treated as one voyage, from Seattle to Dawson, and moreover, if any peril, or loss under the policy did ensue, it resulted directly from the unseaworthiness in question.

c. Because of the express wording of the policy as follows: "warranted free from particular average, unless the vessel, or craft be stranded, sunk or burnt, *each craft, or lighter being deemed a separate insurance.*"

5. We submit that the expenditures were grossly disproportionate to the necessities of the case, so much so as to be wholly unreasonable under the facts adduced, and the law applicable thereto.

6. That it was the duty of the appellee as a ship owner, and carrier even earning its own freight, to forward the cargo to destination in case the voyage was broken up (which it was not), and that the appellant in this case had such an interest in the goods, as an insurer, as entitled it to rely upon the performance of this duty.

7. That the so-called adjustment in this case was such in name only, and was simply an ex-parte opinion of the adjustor that the appellant was liable under the sue and labor clause by reason of the fact that its agent had written letters which the adjustor misconstrued into a supposed admission of liability, which letters were written after the contract for a large part of the expenditures had been entered into, and further, that said adjustment, so-called, entirely eliminated features upon which an adjustment is supposed to rest; namely, the interdependent rights and liabilities of the parties, and contributory values under the principles of general average. This point being in no wise lessened by the fact that the libellant was the owner of the Robert Kerr, of the barge Peter, of the cargo of both, and of the freight money. And if the libellant relies alone on the sue and labor clause, then why was an adjustment had? The sue and labor clause is not subject to adjustment.

ADMIRALTY HAS NO JURISDICTION TO ENFORCE THE RECOVERY OF THESE FORWARDING EXPENSES, FOR SUCH WERE NOT INCURRED BECAUSE OF A LOSS FROM ANY PERIL INSURED AGAINST, OR BECAUSE OF ANY MISFORTUNE ARISING FROM ANY PERIL INSURED AGAINST.

Of course it is not contended that a Court of Ad-

miralty has not jurisdiction of a cause upon a policy of Marine Insurance. Such jurisdiction is now well settled. But the appellant does contend that the expenses of forwarding the subject matter of insurance were not incurred because of any peril underwritten in the policy, or because of any misfortune arising because of any peril so underwritten. The expenses so incurred were expenses purely and simply of a land venture undertaken by the appellee to get its goods to a market.

A resume of the history of the "sue and labor clause" will, we think, show this.

Gow on Marine Insurance, at Chapter 7, recites the history of the clause, and on page 120 says: "It is, in fact, a supplementary side contract, dealing with one separate class of expenses, known as 'particular charges,' its operation is limited and completed by what is termed the waiver clause," and on page 121 he goes on to say: "It is to be observed that the clause providing for suing and laboring takes no effect until a loss or misfortune has actually occurred; it does not cover expenses incurred or operations undertaken with the object of averting the occurrence of a peril." (See Arnold on Insurance, vol. 2, sections 865, 869 and 871.)

"By this clause the insurer undertakes an additional liability over and above the insurance, properly so called, and quite of a different nature. It follows that 'particular charges' cannot be added to the 'particular average,' or damage done to the subject of insurance, so as to increase the amount of the latter to three or five per cent, and so avoid the effect of the memorandum."

See: Arnold on Ins., vol. 2, sec. 870: "The cases that established the above mentioned limitation of the

"In the former case, the policy was on iron rails applicability of the clause are *Great Indian Peninsular Railway Co. vs. Saunders.* and *Booth vs. Gair.*
for Bombay 'warranted free from particular average unless the ship be stranded. sunk, or burnt.' The vessel

was compelled by perils insured against to put into Plymouth in such a state as not to be worth repairing, but she was not stranded, sunk, or burnt. The rails were landed and sent on by other vessels at a cost of £825, the whole of which sum, inasmuch as the original contract of carriage provided for payment of freight 'ship lost or not lost,' was an extra expense incured by the shippers in consequence of the loss of the original ship. It was held that for this sum the underwriters were not liable, either under the suing or laboring clause or otherwise, on the ground that at the time when the expenditure was incurred the iron was in no peril of total loss, for which alone, the underwriters were responsible.''

(See: Arnold on Ins., vol. 2, sec. 872.)

There is no claim here of a total loss, nor does the appellee rely upon any general average contribution. Nor is it true that there was loss under the head of particular average, which is a misnomer for what should be called and is a partial loss.

The amount sought to be recovered here is therefore as Mr. Gow points out, included under the head of particular charges.

If they are not maritime in nature and not an integral part of a maritime contract this court cannot have jurisdiction.

Can it be contended for a moment that expense for hauling goods overland from Circle City by horse, or dog sleds, for the purpose (as we contend) of meeting a market, or even (as the appellee contends) for the purpose of averting a peril, *which might arise months in the future,* were incurred under a contract maritime in its nature, or had any maritime character whatsoever?

It should be borne in mind that the appellee does not contend for a recovery in this case, based upon the theory of forwarding charges as such, for such a contention instantly opens the whole field of general average and would force all of the cargo of the Kerr and the freight money and the Robert Kerr (if the forwarding

was to relieve her of weight) to contribute to the expense thereof and the goods themselves, based upon their value with freight added, would have to contribute thereto. These charges were laid while the goods were on the Kerr and after the *alleged* peril occurred, and after appellants had wrongfully separated *part of the risk.* They were contended to be for the safety of ship and cargo by lightening the Kerr and reducing the danger of *her* destruction as well. As Mr. Gow says, at page 226: "It is evident that the expenses embraced under the sue and labor clause are after all but a very limited class of those that may be incurred to safeguard property. For it might be that the property insured could not be saved except by taking steps to save other property not insured on the same policy. Similarly, it might be impossible to save cargo without ship or ship without cargo. It might be that the only person capable of taking the steps necessary to save all interests (or any) is not the agent of any one assured anywhere, but is a man who is ready to do the work on conditions of hire or share of values saved or a lump sum paid down. If the assistance thus proferred is accepted, or if the operations are for the common benefit of the whole venture, the expenses are no longer recoverable from underwriters under the sue and labor clause, for the expenses are not special, but common to several if not to all interests in the venture; they are not particular, but general; they are not the payment of servants or factors, but the recompense of salvors; they are not suing and laboring expenses, but they are *General Average* expenditures;" and on page 287 and 288 Mr. Gow quotes: "Here the ship owner had an interest in getting the ship off and bringing the cargo into port, in order that he might earn his freight. * * * A great deal of what he has done was in the performance of his own contract. He was bound to use every effort

to convey the cargo safely to destination, and he could only give up the task when it was hopeless.' "

The expense of getting this cargo to Dawson *not* being forwarding charges and not being in connection with a maritime contract, to-wit: The insurance of goods carried by sea; all expenditures thereon were simply and solely expenses incurred in a land venture, to-wit, the carriage of the same overland. Surely such a contract in itself is not within the jurisdiction of this Court.

> *The Harvey and Henry*, 86 Federal, p. 656;
> *Graham v. O. R. & N. Co.*, 134 Federal 454.

It is undoubtedly true, then, that unless the expenses arose out of some loss occasioned by a peril insured against or some misfortune brought about by a peril insured against, the cost of such forwarding cannot fall upon the insurer.

Emerigon treats of expenses incured under the "sue and labor" clause in Chapt. XVII of his work as translated by Samuel Meredith, Esq., in 1850. The title of that chapter is *"Of Abandonment,"* and "Sue and labor" expenses are treated of in Sec. VII, under the head *"Of Salvage."* Therein it is shown that these "expenses of salvage" could be maritime in their nature only when they arose out of or because of some peril insured against or because of some misfortune arising from a peril insured against. In this section VII Emerigon gives the different forms of the "sue and labor" clause, including the London form which is in all respects similar to the one in the policy at bar, and throughout the whole of this discussion of the subject, it is clear that the "sue and labor" clause never comes into being as any part of a maritime contract upon which marine underwriters can be held liable, unless the voyage is proximately broken up by a peril insured

against or the adventure meets with some misfortune caused by a peril insured against, which necessitates suing, laboring, etc., to save the subject matter of insurance. If a loss is not incurred in this way, or a misfortune does not arise in this way, but the subject matter of insurance does meet with a misfortune not caused by a peril insured against in the policy and the assured incurs expenses in sending the subject matter forward, as in this case, by dog sleds overland, it is a land venture pure and simple, and one with which this Court, sitting in Admiratly, can have nothing to do; and the underwriters can in no way be liable.

We further submit that it is apparent from the language of the policy with regard to the perils insured against, as hereinbefore set forth, that the insurance was not of a delivery of the goods at Dawson under any and all circumstances, but only on the terms and conditions in the policy set forth, and the underwriter is, of course, not liable under the terms of the policy (the sue and labor clause not being under consideration) for any loss or peril than the one insured against. There is no question but that the words "and of all other perils, losses, etc.," are limited in interpreting the policy, to perils ejusdem generis, with the words particularly set forth.

(Gow, pages 116 and 117 and citations.)

"All other perils, losses and misfortunes that have or shall come, etc., is defined as covering all cases of marine damage of the like kind with those specialy enumerated and occasioned by similar cases."

The underwriter is not liable unless the loss or expense is proximately caused by a peril enumerated in the policy; he is not liable for a loss or expense caused through *apprehension* of a loss by a peril insured against; and the loss must be caused by the violent operation of a peril insured against.

Am. & Eng. Ency. of Law, 2nd Ed., Vol. XIX., pp. 1021, 1022.

Cullen vs. Butler, 5 M. & S. (per Lord Ellenborough);

Butler vs. Wiedman, B. & Ald., 698, 5 E. C. L., 324;

Davison vs. Burnard, L. R. 4, C. P. 117;

Murray vs. Nova Scotia Marine Ins. Co., 10 Nova Scotia, 24;

Moses vs. Sun Mut. Ins. Co., 1 Duer. (N. Y.) 159;

De Peau vs. Russell, 1 Brew. (S. C.) 441, 2 Am. Dec. 676."

It necessarily follows that if the expenditures made by the libellant were not approximately caused by a peril insured against no liability arose under the policy. Or to put it in the elementary language used by the text writer: "That a peril insured against must be the efficient and predominating cause of the loss or of the extra expense if such expenses were part of the subject of the insurance."

Where is it found that the Robert Kerr met with any loss or misfortune from any peril of the sea? If none, where does the liability of the appellant arise? Is it not a fact of which the world is aware that the Yukon River is a broad and shallow stream which practically freezes solid in the month of October in every year. so to remain for the ensuing Arctic night? Is it not a fact equally well known that vessels navigating the Yukon River, if left therein, *must* be frozen in? Is it not a fact that practically all of the vessels navigating the Yukon River are frozen in and remain so during every winter? Is not that fact conclusively established by the evidence in this case? Was it not to be expected; was it not absolutely known, that the Kerr would be frozen in at some point in the course of that river? Did not the parties to this insurance contemplate all of the natural physical conditions which arose in this case? Is it not a fact equally well known that these river steamers constantly ground? Is there any serious dispute upon that fact? Did anything occur out

of the ordinary, out of what was expected and known would occur, except the defective boilers? Can we be construed to have insured that these things would not occur? If not, what loss or misfortune took place? Mr. Gow, on page 96, says:

"If a vessel undertakes a voyage to port, the approach to which is notoriously such that the vessel must ground every low water, loss or damage from such grounding is not chargeable to the underwriter as the consequence *of a peril of the seas.* Using the words of Lord Tenterden in *Wells v. Hopwood,* 3 B. & Ad. 20, 1832 (Lowndes, Law of Marine Ins., p. 198), the ground is not 'taken under any extraordinary circumstances of time or place, by reason of some unusual or accidental occurrence.' Of such a character is the approach to Limerick. There are also many tidal harbors in which it is impossible for vessels above a certain size to lie safely always afloat. If a vessel above that size is sent, such grounding as occurs is the ordinary course of such a vessel's stay at that port."

Stranding by a ship is defined to be an accident of an unusual character whereby she goes upon the strand and receives injury in consequence.

> *Bishop v. Benthin,* 7 B. & C. 219, 1 M. & W. R. Y. 49, 11 C. B. 876;
> *Heame v. Edmunds,* 13 R. & B. 388.

This was a case where a vessel, with cargo on board, took the ground on two consecutive days proceeding up to Cork Harbor under pilot and being afterwards moored in the usual course was thrown on her broad side by the receding tide. It was held that she did not strand. In *Cochran v. Gurney,* 1 Ell. & Bl. 456, it was held: that if a ship take the ground at the ordinary time, in the ordinary place, in the ordinary manner, and from ordinary causes; that is: so in all respects as it must have been contemplated she would in the court of an ordinary voyage, such taking of the ground is not a stranding.

The facts of the matter are that the Kerr did not reach Dawson in the fall of 1903, because she was overloaded; because she could not carry steam in her boilers; because she had an unwieldy barge to tow; because she met with the ordinary conditions with the navigation of the river; because she refused to make up for her unwieldy, overladen, unseaworthy condition by lightening any part of her cargo; because the appellee was regardful only of its determination to hang onto the cargo which it was anxious to sell to the Dawson Christmas market to the disconforture of its competitors (Apostles, pp. 812, 813), and in an inglorious attempt to cancel its contracts with them and break them up in business (Bryant's Letter —Respondent's Ex. 4, I, p. 713); because this cargo was of far more value in Dawson at this particular time than it would be at any other time, and because of its grim determination to hang onto the 'sacred cow.' No one can read the letters of libellant filed herein and doubt these facts a moment.

> See Ex's. of Libellants, 4C, Apostles, p. 962; 4D, Apostles, p. 963; 4E, Apostles, p. 965; 4G, Apostles, p. 968; 4H, Apostles, p. 970; 4I, Apostles, pp. 971-974; 4J, Apostles, p. 975; and particularly Ex. No. 5, Apostles, p. 978; Ex. No. 6, Apostles, p. 979; also Respondent's Exhibits I, J, K.

THE SUE AND LABOR CLAUSE IS NOT BY THE POLICY made applicable to a case of remote peril or apprehension thereof, but to an immediate danger and present loss.

> *See* 19 *Am. & Eng.* (2nd), p. 1021-1022;
> *King v. Ins. Co.*, 6 Cranch, 71 (U. S.).

It cannot be seriously contended that the underwriter under this clause intended to, or can be construed to, agree that the goods insured are to be protected by unusual efforts or extraordinary expenditures from *incurring any peril.* They incur a certain degree of peril when they are laden on board; as for instance, that pirates in some distant sea may capture them; that storms may occur; that fire and collision may happen; men have never ceased to speak in serious tones of "they who go down to the sea in ships."

Now, these goods on board the Kerr in October, 1903, being frozen meats, were in about as safe a position as can well be imagined. The icy fingers of winter were about to be enclosed upon them. Their preservation until the next spring was an absolute certainty. For six months no harm could come to them; the Sue and Labor clause could not be invoked until a *loss or misfortune* had *occurred.* Its language in that respect is plain and unambiguous. "The Sue and Labor clause," as Mr. Gow says (page 121), "takes no effect until a loss or misfortune has actually occurred; it does not cover expenses incurred on operations undertaken with the object of *avoiding the occurrence* of *a peril.*"

That is our business; that's what we insured to take our chances on. We did not accept a premium from a ship owner or the owner of cargo against the perils of the sea which we are content to bear and then expect the master of the ship to return to port on the beginning of a voyage from Puget Sound to Australia because he feels that pirates may seize him in the Malay Straits. That is our risk.

In the case at bar, supposing for the sake of argument that the Kerr might have met with misfortune the next spring (she had not met with any so far), and the goods had been lost under the terms of the policy; the appellee had its insurance. Until some loss had occurred or was at least imminent, what right had the appellee to

undertake the duties of the respondent or to attempt to fix upon us a liability greater than we had assumed or agreed to take; as in this case, making contracts to almost the full amount of the policy. As a matter of fact, the evidence in this case, common sense and universal knowledge teach us that not only was there no right to anticipate some danger (not a loss) which might occur six months hence, but that no serious danger would then or ever after exist; the Kerr was in a safe position, the correspondence of the libellant's officers to and from Dawson City, *the statement of Mr. Bryant, and the master and pilot* of the Kerr, prove conclusively that the Kerr was *supposed to be by them then,* as she was thereafter proved to be, in a safe position. And the evidence further shows that *no ship and cargo* has ever been lost on the river.

See Letters and Telegrams from Bryant, Libellants' Exhibits, respectively, C, D, four, five and six, *above cited.*

This bogey man of the dangers of the ice in the river, to any other than perhaps some serious damage to the hull of the boat, are not shown to have existed. Boats on the Yukon River are not destroyed, though they are undoubtedly injured more or less, by the ice.

(See Apostles, pp. 280. 386.)

It was a matter of indifference to the rights and liabilities under this policy whether the Kerr got a hole stove in her; whether she was jammed and injured, so long as this cargo was not lost or injured by the destruction of the Kerr; but we are asked to pay over five-sixths of the policy to help save the hull of the Kerr from injury without any contribution to us by the vessel.

The appellee cannot point, in the evidence, to a single case of total loss of boat or cargo on the Yukon River below Dawson. On the contrary, a number of witnesses

testified that they had never known a steamboat to be totally wrecked or more than seriously embarrassed.

The case at bar is the only case of which we know in which the Court says that the misfortune was not caused nor did it arise by or because of a peril insured against, yet the underwriter is held liable for the expense of sending the subject matter to its destination. The language of the Court below in this regard follows. On page 774 of the Transcript:

*"The steamer encountered only the usual hinderances incident to a voyage against the current in a shallow river at the season of low water. The voyage was not broken up, but was finally completed after months of delay, and the cargo was delivered. * * * The vessel was not * * * in imminent peril at any time from any extraordinary marine disaster contemplated in the policy of marine insurance."*

And on page 776:

"It is the opinion of the Court that from the beginning to the end of the voyage in question there was no disaster, nor peril of navigation, different from the ordinary and usual incidents of navigation on the Yukon River."

And on page 778 of the Transcript:

"The Kerr and the Lightning were both placed in the most secure positions which they could get to, but they were not fully protected, and there was reasonable cause for apprehending their destruction, and loss of the goods on board, which I consider justified the expense of forwarding the goods to Dawson."

And on page 777:

"By the failure to complete the voyage in the fall of

1903, *the libellant's goods were exposed to a peril covered by the policy, viz.: The peril of being overwhelmed and crushed by masses of ice if left on board the vessel until the following spring.*"

This failure, then, to complete the voyage in the fall of 1903 was the proximate cause of the incurring of the forwarding expenses; this failure to complete the voyage in the fall of 1903 was the proximate cause of the appellee apprehending the destruction of the Kerr and the Lightning and the loss of the goods on board, six months later. But this failure to complete the voyage, this proximate cause of the forwarding expenses, the court says, was not a peril insured against in the policy:

"The steamer encountered only usual hinderances incident to a voyage against the current in a shallow river at the season of low water. The voyage was not broken up." "From the beginning to the end of the voyage there was no disaster, nor peril of navigation, different from the ordinary and usual incidents of navigation on the Yukon River."

The Supreme Court of the United States, says, in *Smith v. Universal Ins. Co.*, 6 Wheat. 185:

"In cases of this sort, where a technical total loss is asserted as a ground of recovery, it is not sufficient that the voyage has been entirely frustrated and lost; but the loss must be occasioned by some peril actually insured against. The peril must act directly, and not circuitously, upon the subject of the insurance. It must be an immediate peril, and the loss the proper consequence of it; and it is not sufficient that the voyage be abandoned, for fear of the operation of the peril."

Now, the insurer was in no way responsible for the failure to complete the voyage in the fall of 1903. We did not insure that the subject matter of insurance would arrive in Dawson in the fall of 1903. The failure to com-

the underwriter is entitled to contributions due from the uninsured risks.

And the appellant submits that the acts of the appellee in this respect amount to a discharge of our liability under the policy. So that the appellee can take either horn of the dilemma; if no peril was encountered the appellant is not liable, if a peril was encountered a general average act was demanded.

What we said with relation to the facts at Fort Yukon apply as well to the acts which took place at Two Pipe Bar with reference to the Kerr. her cargo and her freight money.

The evidence shows that the Kerr, even then, was drawing only slightly more than the water in the river at this point. She could have lessened her draft by jettisoning a part of her cargo, saving a large part of it, and while the appellee would have had to suffer in contribution from the Kerr and freight money to a general average loss, still it was one of our rights that such contribution be made. The appellee had no right to attempt to saddle the whole loss upon the underwriter by refusing to meet the exigencies of the occasion; a part of such loss the law necessarily laid upon the appellee. This, of course (again assuming—what we submit was not the case,—viz.: that a peril insured against was encountered), violated the terms of the policy, and, we contend, released the underwriter from all liability thereunder.

THE POLICY NEVER ATTACHED BECAUSE OF THE UNSEAWORTHINESS OF THE KERR WHICH EXISTED AT THE INCEPTION OF THE VOYAGE.

No matter whether the voyage is construed to have begun on Puget Sound (for the evidence shows that the

Kerr even then was running with defective boilers), or whether the inception of the voyage is construed to have been at the time of the trans-shipment at St. Michaels—which was a second stage of the voyage independent of the first,—we submit that not only did this unseaworthiness prevent the attachment of the policy under the law as applicable to the case in the absence of the special provisions in this policy, but that the language of the policy, as follows, "each craft or lighter being deemed a separate assurance," renders unnecessary the citation of any authorities to sustain the general proposition.

It was strenuously contended in the Court below by the appellee that the voyage was indivisible and that the policy attached upon the lading of the goods on the Elihu Thompson and that therefore any unseaworthiness of the Kerr would not avoid the effect thereof.

The appellee cited a large number of cases in attempting to support the indivisibility of the voyage, none of which were in point under the facts of this case, those cases being cases which were cited by Mr. Joyce in a foot note to Sec. 1931, of 2 Joyce on Insurance, under the title "Representations false as to a part of the property . . entire or severable contract."

There is undoubtedly a want of direct authority on this subject although in the case of *Van Valkenburgh v. Astor Co.*, 1 Bosworth (N. Y.) p. 61, it was held by the lower court that a similar voyage was divisible and that the unseaworthiness of connecting boats at the time of the trans-shipment of goods prevented the attachment of the policy. Upon appeal the case was reversed upon the ground that such connecting boats were not shown to have been unseaworthy, and the presiding Justices went on to express an opinion amounting to dictum in the case contrary to the contention of the appellant herein.

We submit that the appellant does not need to rely upon any theory of the divisibility of the voyage, as it was plainly two stages of one voyage by its very nature,

and in effect two separate voyages, and that by the law of the United States even a single ship must be seaworthy, not only when leaving port upon a voyage divided into stages, but must be kept seaworthy at the beginning of each successive stage.

In this respect the law of the United States is at variance with the English law.

> *Paddock v. Franklin Ins. Co.*, 11 Pickering, 226.
> *Arnould on Marine Insurance,* Seventh Edition, Vol. 2, Secs. 695, 698, 699.
> *Berwand v. Greenwich Ins. Co.*, 21 N. E. 151.

In *Hazard's Administrator vs. The New England Marine Insurance Company*, 8 Peters, (U. S.) 557, 581, 585-6, (8 L. ed. 1043, at pp. 1053, 1054) the Supreme Court of the United States upheld the instruction of a lower court that if the injury which has occurred to the vessel in question at the Cape de Verde was reparable and could have been repaired there or at St. Salvador or at any other port to which vessels stopped in the course of the voyage, the master was bound to have caused such repairs to be made if they were material to prevent any loss.

In section 695 above cited Mr. Arnould uses the following language:

"On this point the law in the United States is at variance with our own, and gives a wider extent to the implied warranty; it is there held that the assured is bound not only to have his vessel seaworthy at the commencement of the voyage, but to keep her so, as far as it depends on himself and his agents, during the continuance thereof, and at the commencement of all its subsequent stages. Thus the underwriter in the United States is held discharged from any loss, which can be distinctly shown to have arisen from the negligence or misconduct of the assured in not keeping the ship in a proper state of repair."

See also cases and authorities cited in 19 Am. Eng. Ency. Law, (2nd Ed.), pp. 1003, 1004.

The fact that the contract in this case expressly provides that each craft or lighter shall be deemed a separate insurance finally disposes of any hope of the appellee that it can escape the consequences of the unseaworthiness of the Kerr, if she was unseaworthy.

It was urged in the Court below that the port of St. Michaels was not a place where the most efficient repairing could be done, and that the appellee should therefore in some measure be relieved of responsibility in case the repairs were not as complete as they might have been made under more favorable circumstances. This, we submit, is not the test of the rights of the parties.

"The question for a jury is whether the ship was fit at the beginning of the risk to encounter the perils of the voyage insured; and that question, it is submitted, must be answered without reference to the circumstances of an antecedent voyage or to the means of having repairs affected, or of obtaining fresh lands."

2 Arnould Marine Insurance, Sec. 709.

The same argument, which could be advanced in support of the seaworthiness of the Kerr—in the face of the evidence in this case, and the enormous amount of lost time, as recited in the engine room log alone (there being entry after entry, following each other in succession, of six hours each)—could be applied with just as much propriety to the loss of the Kerr, if she had been insured in port in a leaky condition and had foundered in a dead calm within a week after leaving port. The loss, in such case, would result—as the alleged loss in this case must have resulted—directly from the unseaworthiness complained of.

The Kerr was within less than three days of Dawson when she was laid up for the winter, and there can be no

reasonable dispute that twice that much time was consumed as the result of her leaky boilers.

The evidence in this case, as shown hereinbelow by the deck and engine room logs, shows that the Kerr and her barge attempted to leave for Dawson on the 28th day August, 1903; that they grounded at the mouth of the river and stuck there until the 31st day of the month, the Kerr being afloat on the 30th and the barge being stuck until the 31st. The entries in the engine room log from that time on show a constant leaking of boilers, lowering of steam and failure to proceed with anything like dispatch.

The appellant desires to cite the court's attention to a few of the entries in the logs.

BRIDGE LOG.

"Sept. 2nd. Boilers leaking very bad. Engineer reports leaking so are unable to keep steam. (Apostles, p. 865.)

"Sept. 3rd. Repairing tubes all day, lost 28 hours. (Apostles, p. 866.)

"Sept. 12th. Boilers, leaking, no steam, stopped to fix tubes; all day and night repairing boilers." (Apostles, p. 868.)

ENGINE ROOM LOG.

From the engine room log it will appear that the Kerr's boilers were in bad shape long before the cargo was laden on board the Elihu Thompson, for instance:

"Aug. 8th. (Which was the voyage down stream from Dawson) Tubes leaking, rolling tubes. (Apostles, p. 882.)

"Aug. 16th. Repairing tubes center boiler, rolled and beaded seven on starboard boiler, rolled and beaded one on port boiler." (Apostles, p. 886.)

It may be mentioned that the engine room log, which

is voluminous and full of detail, makes no mention of cold water test at St. Michaels, but does state:

"Aug. 29th. Found considerable scale in all three boilers." (Apostles, p. 891.) (Scale being an adhesive formation, forming in boilers which are not properly cleaned, and not a deposit formed in a day or two.)

"Sept. 1st." (Being the next day after the Kerr started up the river.) "Asst. engineer reports tubes main boiler leaking slightly."

A second entry appears on the same day:

"Tubes leaking." (Apostles, p. 894.)

"Sept. 2nd." (Three entries with regard to leading boilers, the third one:) "Center boiler so bad can't get steam, tied up to bank to repair tubes," and next watch, "Lay at bank cooling boiler to repair tubes." "Things in general did not look good." (Apostles, p. 896.)

"Sept. 2nd. Working on boilers." Two entries: "Working all day; midships boiler down four inches in diameter." (Apostles, p. 896-7.)

"Sept. 4th. Boilers working fairly under reduced steam." (Apostles, p. 897.)

"Sept. 11th. Three entries on leaking boilers." (Apostles, p. 904.)

"Sept. 12th. Port boiler's tubes leaking about same." (Apostles, p. 906.)

"Sept. 13th. Tubes commenced leaking badly in port wing boiler and steam ran down to 70 lbs. on gauge; went to bank, fixed up boiler and got steam *up to* 130 pounds." (Apostles, p. 906.)

"Sept. 19th. Port boiler leaking." (Apostles, p. 911.)

"Sept. 20th. Rolled tubes and drove ferrules in port boiler." (Apostles, pp. 911, 912.)

"Sept. 22nd." Two on leaking boilers: entries on Sept. 24th, 25th, 26th and 27th. There being three entries on Sept. 26th and the boilers leaking while the boat was lying on the bar. (Apostles, pp. 914, 915, 917, 918, 919, 920.)

On 28th, 60 lbs. steam while lying at the bank and tubes leaking, under less than one-half her supposed normal pressure. The same continued on the 29th and 30th when they were working driving ferrules. (Apostles, pp. 920, 921, 922.)

On Oct. 2nd. a noted occurrence took place, the entry reads: "Carried 150 lbs. of steam for three quarters of an hour." That this supposed seaworthy vessel carried her supposed normal pressure of steam for three quarters of an hour was of such remarkable note that the engineer logged it. (Apostles, p. 924.)

Oct. 3rd. "Low steam in main boilers." (Apostles, pp. 924, 925.) Several entries to the same effect. These entries continued on through until the steamer was laid up. The entries in the Kerr's log beginning with 29th of May and continuing to June 11th of the next spring (Apostles, pp. 948-952) are eloquent in their condemnation of the boilers; and the conclusion is irresistible from the *enormous amount of time* and labor recited as having been put upon them and that they absolutely *took the boilers down and rebuilt them,* that these tubes were in deplorable condition up to the last hour of their use in the fall before. The log proves that they were not used after the vessel laid up for winter quarters until she went up the river the coming spring.

The appellant is perfectly willing to rest its case concerning the seaworthiness of the Kerr's boilers and their fitness and her ability to stem the current of the Yukon River—her failure to do which was the only peril to which the goods in question are claimed to have been submitted —upon the entries in the two logs of the Kerr. There was abundant corroborating evidence on the part of the witnesses for the appellant.

(See the evidence of Stack, Apostles pp. 614-642;
Of Douglas, the pilot, Apostles pp. 668-696;
Of Kenne, Apostles, p. 646;
Of Keenan, Asst. Eng., Apostles, pp. 221, 251, 252.)

To the same effect, the appellant desires to call this Court's attention to the evidence of the main witness for Appelle on this subject as given at Seattle, as com-

pared with the testimony of the same witness given at Dawson. (See Apostles, pp. 297, 298.) The only pertinancy which the appellant attaches to the evidence of Mr. Jackling, who was the chief engineer of the Kerr, consists in the fact that upon his first examination he particularly denied that there was leaking of any consequence and upon his deposition in Dawson he contradicts himself and thereby—especially in face of his own log—impeached his evidence to such an extent as to make it worthless upon any other subject on which he testified.

The appellee undertook to prove that a cold water test of 150 pounds was applied to the boilers for a period of about fifteen minutes at St. Michaels. We submit, in view of the contradictory evidence of Mr. Jackling; of the absence of any mention thereof in the log, and of its denial by the witness Stack, that no such test is likely to have taken place. But even if it did take place, we desire to call the court's attention to an important provision of the law with reference thereto; namely, that the law of the United States provides that a steam vessel shall only be allowed to carry 100 pounds of steam for 150 pounds of cold water pressure.

"All boilers used on steam vessels and constructed of iron or steel plate, under the provision of Section 4430, shall be subject to a hydrostatic test, in the ratio of 150 pounds to the square inch to 100 pounds to the square inch of the working steam power allowed."

U. S. Rev. Statutes, Sect. 4418.

In the earlier part of the same section these proportions are specified as applying to new boilers. These boilers were four years old. In other words, the Kerr could only safely and surely carry 100 pounds of steam upon a test of 150 pounds cold water pressure. Yet she was expected to carry 135 to 150 pounds for practical operation. When the steam got to 90 "it was about time to stop." (Apostles, p. 687.) This also eliminated wholly the factor

of safety, universally taken into account, which is a part of the efficiency of the vessel and upon which the insurer has a right to and does rely, and which is undoubtedly the foundation for the law aforesaid.

We submit, further, that the Kerr was unseaworthy in the sense that she was overladen in attempting to push a scow of the dimensions of the one in question, or any scow at all, up the Yukon River, and particularly, as both the scow Peter and the Kerr were apparently overloaded for the draft of water in the river when they started up. The Peter was stuck for over two days at the mouth of the river. There is no provision in the policy for liberty to tow, nor had the respondent any knowledge of the intentions to tow when the policy was issued.

The test of seaworthiness is always the fitness of the vessel for the voyage in question. Both the Kerr and the Peter were, apparently at the very start, loaded to their limit and forced against a draft of water which must have been known to be insufficient under the circumstances of the case. The appellee's officers knew that the Kerr's boilers were leaking and failing to hold steam, that the river was low and falling lower, that navigation would soon close, yet they loaded this member of the "Camel back" fleet to her utmost capacity, and then added more for good measure so that she could not get into the river for two days. They added the last pound that broke the camel's back, and all in an endeavor to get this precious cargo up the river, knowing all the time that they were likely to be frozen in and detained until Spring. Now they ask us to pay for the money they expended in attempting to avoid delay.

THE EXPENDITURES WERE DISPROPORTIONATE TO THE NECESSITIES OF THE CASE AND WHOLLY EXCESSIVE AND UNREASONABLE.

This is apparent from the record and the purposes of

the appellee in desiring to rush these goods to Dawson at express speed to meet the Xmas trade.

It is a matter of common knowledge that the moving of this freight across the frozen Arctic country in the dead of winter would cost far more than to transport it by water at a time when the river was open. It is also a matter of common knowledge that it costs more money to move freight at top speed than at a more moderate speed.

The contract which was entered into between the appellee and H. N. Ford, dated the 31st day of Oct., 1903, is in the record.

Appellant's Exhibit "C" (Apostles, p. 812) shows the following:

"And whereas the company is desirous of having from thirty to forty tons of the said cargo brought to Dawson at the earliest possible date and in any event *not later than the 20the day of December,* 1903, *in order that such proportion of the said meats, poultry, etc., shall be available for the Christmas trade in Dawson aforesaid, as the market prices and demand will be better before the 25th day of Dcember than subsequent thereto.*

And, whereas, the said Ford has agreed to freight the said seventy tons, more or less, to Dawson on the terms and conditions hereinafter set forth."

The *haste* of the appellee is recited over its own signature, *likewise the purpose.*

An inspection of the items comprising the cargo will show that while, undoubtedly, a great deal of this cargo was cold storage, a very considerable part of it—we are not speaking of hay and feed—consisted of supplies which were in no sense cold storage products, such. for instance, as butter 29,992 lbs., salt 40,000 lbs., bacon 5,396 lbs., not to mention papers, blankets, harness, etc. (Exhibit L., Apostles, p. 829), and all of this cargo which was available for the Christmas trade, the appellee was insistently forcing to the Dawson market with the greatest degre of dispatch.

This is shown all the way through the contract cited above (Apostles, particularly on pages 814, 818 and 819).

the appellee even exacting a $5,000 bond in its efforts to compel the delivery of these goods in Dawson not later than the 20th of Dec., 1903. The same haste is shown in the subsequent agreement. (Libellant's Exhibit "D", Apostles, pp. 821 to 826 incl.)

No serious contention can be made that butter, bacon, ham, salt and similar articles would be injured by any such thawing weather as would have occurred before an Arctic winter releases its clutch upon the Yukon, even supposing that the argument of the appellee that all of this cargo, cold storage and otherwise, could not have been safely cached, is open to debate.

We submit, however, that as a matter of fact, and as appears from the evidence in this case, and the common knowledge of men, the whole of the cargo of the Kerr could have been amply protected at Circle City, or for that matter at any point on the Yukon River.

When once the temperature had gotten low enough to freeze ice in the moving current of the Yukon the Arctic winter had set in; nothing thereafter could thaw or melt for six months to come. The appellee undertook to carry the most perishable part of the cargo to Dawson upon an open steamboat within a few feet of the boiler while the river was open, without any refrigeration or protection whatever, and offered evidence that those goods would not suffer thereby. (Apostles, pp. 56, 57; and pp. 434, 435;—Le Ballister, p. 277.) The river was ice, the whole surrounding country was snow and ice, and the surface of nature was covered by a protecting mantle of moss, which made an insulation perfect in character. (See evidence of Stack, Kenne, etc., above cited.)

If this cargo had been removed and simply buried in ice with the means which nature had laid to hand, and with the labor of a few men, what possible destruction could have come to it? Long before such a rugged, even though primitive ice house, could have felt the heat of the ensuing spring, the waters of the Yukon would have

been flowing to the Arctic Ocean, and the labor of a few men, working during the night, could have reshipped such a portion as was necessary of the 210 tons of cargo, in the cold storage chambers of the Kerr, after she was launched back into the river—this is supposing, of course, that the fears of the appellee as to the safety of the Kerr were bona fide, and sufficient to induce its officers to haul her out of the river.) This we see, however, was not the case after this Christmas cargo was removed. The Kerr was left in her winter quarters, her presence in Dawson was not necessary; there was no Christmas market for the Kerr and she remained in perfect safety where she lay. No haste was necessary; they had months then in which to begin to discharge. They would only need to see that the goods were protected for a few days in the spring as the time elapsing after a danger from the break-up began until the river was open, would be a week or so. (Apostles, pp. 210-211, 215, 251, 252.)

Here, again, a reading of the log shows that the Kerr was treated in the ordinary way, and that nothing out of the usual was deemed to have occurred by those in charge of her. The entire lack of any evidence of vessels being destroyed on the Yukon and Mr. Bryant's telegram above referred to, shows that the forwarding of these goods at such an expense was unnecessary. A consideration of the bulk and weight of the goods must convince any one of the comparatively small cost of removing them from the Kerr, if any danger was likely to result in the spring.

It would not have been necessary, for the short time the goods would have had to be protected in the spring of 1904, to build an elaborate or expensive ice house. The cargo, including all of the so-called perishable stuff, and the other items we have enumerated, amounted to 210 tons: eighty cubic feet is figured to the ton; 210 tons would therefore amount to 16,800 cubic feet and occupy a room 20 feet sq. and 20 ft. high, or subdivisions thereof. We therefore submit that the attempt of the appellee to

hold us for approximately five-sixths of the total insured value of these goods—not upon charges accruing from time to time, and perhaps growing in amount and beyond the estimates of the appellee, but upon a contract deliberately entered into and for such purpose was absolutely unconscionable and we further submit that the purpose, as recited in the contract with Ford, to-wit, to force the delivery of the goods for a market which amounted to 100 per cent profit to the appellee, only aggrevates the situation. That the law will not sustain any such unnecessary expenditures we think is plain.

2 Arnould, Marine Ins., Sec. 874.

DUTY OF APPELLE TO FORWARD AS SHIP-OWNER EARNING FREIGHT.

The appellant desires to urge the further point that it was the duty of the owner of the Kerr to forward this cargo to Dawson under the implied contract of affreightment and in order to earn the freight money, even if it was necessary to incur additional expense therefor.

The fact that the appellee herein owned the Kerr and owned the cargo and was thus earning its own freight, as has already been argued, has no effect upon the fundamental rights of the parties. It could not earn the freight except by the delivery of the cargo. It was possible enough to send the frozen meats forward and do so before any possible danger or damage thereto could result. We say that it was possible to do so. It was practically demonstrated; it was done. That part of the cargo arrived in Dawson long before the river opened. The appellant, in so doing, simply carried out its legal duty and one upon which the appellant, as insurer of the cargo, had a right to rely under the law. This forwarding of the cargo was done, not to save the cargo, but to earn the freight. And it makes no difference that in order to so earn the freight

it had to incur an expense which might amount to more than the reasonable freight money for the voyage in question. The law in this respect we submit is beyond question.

> *The Naga Hammond*, 9 Wallace (U. S.) 435;
> *Harrison v. Fortilage*, 161 U. S., 57;
> *Waterhouse v. Mining Company*, 97 Fed., 566;
> Parsons on Shipping and Admiralty, 233;
> 15 Am. Eng. Enc. Law, (2d Ed.), pp. 256, 257 *and citations;*
> *Kidson v. The Ins. Co.*, Law Reports, 1 C. P. 535 and 2 C. P. 257.

The case of *Smith v. Insurance Company*, 6 Wheaton, (U. S.), p. 182, (5 L. Ed., 937), is very pertinant upon this subject. Therein Judge Story says:

"In cases of this sort, where a technical total loss is asserted as a ground of recovery, it is not sufficient that the voyage has been entirely frustrated and lost; but the loss must be occasioned by some peril actually insured against. The peril must act directly, and not circuitously, upon the subject of the insurance. It must be an immediate peril, and the loss the proper consequence to it; and it is not sufficint that the voyage be abandoned for fear of the peril."

INVALIDITY OF ADJUSTMENT.

The adjustment in this case was such in name only. It was practically a judicial determination by the Adjustor that the respondent herein had committed itself to the payment of these sue and labor expenses as appearing by letters written by M. C. Harrison & Co., of San Francisco. This appears from the evidence of Mr. Bogle on that subject. (Apostles, pp. 602-613.) We think that Mr. Bogle's evidence is very fair and conscientious, the only dispute possibly being the conclusions deduced therefrom. The

appellant submits that Mr. Bogle's evidence, particularly upon cross examination, established the fact that the Adjuster treated it as a settled fact that this appellant was liable for he charges under the "Sue and Labor" clause and that he based his award substantially upon that theory.

There can be no sort of question that the province of any adjustor is just what the name implies, to balance up items of expenditures, losses, etc., in arriving at a general average settlement, and that when he attempts basing the same on the legal rights of the parties he must bring them within the terms of the law. And we further submit that it is not an adjustor's province to decide questions of law where they are the sole matter in controversy, as was substantially the case here. In other words, upon the theory of the adjustor there was nothing to adjust.

The alleged adjustment was therefore arbitrary and was null and void. It was an attempt on the adjustor's part to try an issue, not as an adjustor but as a court.

The adjustment in any event cannot deprive this court of jurisdiction in the first instance, nor can it be considered as a liquidation upon which a suit can be founded. This is elementary and is necessarily admitted by the appellee by the very fact of bringing this suit. There is no question of our right to dispute the legal conclusion of any adjustor under any circumstances, and particularly where, as in the present case, there was in fact no adjustment at all.

We further submit that the evidence in this case, including the correspondence admitted in evidence, shows that the appellant never intended to, and never did, bind itself to approve of these forwarding expenses. It was contended in the lower court that this correspondence between the agents of appellant and appellee misled appelee. (Apostles, pp. 830, 836, 837, 850.)

It must be apparent that the appellee in this case was in possession of all the facts and in a position to know

what was to its advantage and to that of the insurer, and that it also knew that the insurer was relying on the duty resting on the appellee of protecting the rights of all concerned in the premises. The correspondence in this case and the evidence of Mr. Bogle can lead to but that one conclusion. Thus, all of the advantage laid with the appellee.

But even if the parties had had equal knowledge, in what way does the fact that we assented to the appellee's taking such steps as it considered necessary, bind the appellant? Appellee got a cargo which cost $60,000 on Puget Sound to Dawson at an advanced price of over one hundred per cent. If this cargo had not been delivered until spring the advances of the Christmas trade would have greatly reduced the price. The appellee would not have been strong handed with its competitors and with those of its customers who had contracts with it which it desired to break, as Mr. Bryant says in his letter referred to above.

Manifestly, then, the appellee was "misled" to its advantage and very great profit. What complaints does it make? Who has been injured? What did we gain? We are only liable for the face of the policy in any event. Their contract with Ford is on the basis of five-sixths of the total liability, without ever having considered the simpler and less expensive means of saving and protecting the cargo, to-wit, by caching, by storing it in cabins or by leaving it on the Kerr.

But there is a far simpler answer than the foregoing, namely, that if the utmost latitude is given to the appellee's contention of our alleged acquiescence and authorization for these advances, and even supposing that it can be claimed that the authorization or ratification by our principal was at all times made—and we submit that the transaction taken as a whole honestly and fairly holds against that interpretation—yet we have then said only what the policy says, for the "Sue and Labor" clause

provides that the appellee might do the very things it did without prejudice to the insurance. *If these things were necessary and reasonable* and if a loss had occurred, yet that should not be considered as a waiver or acceptance of abandonment. We submit that there is absolutely nothing in the appellee's contention on that point.

APPELLANT SHOULD HAVE HAD JUDGMENT AWARDED TO IT ON ITS CROSS LIBEL.

That the appellant in this case is entitled to recover a part of the $15,000 paid to the appellee, we submit to the court upon the following brief statement:

This money was paid in utter ignorance of the deplorable condition of the Kerr's boilers. The losses in this case claimed by the appellee resulted from her inability to stem the current of the Yukon. She was unable to stem the current of the Yukon because she could not carry her normal steam pressure; because she was delayed, in addition to the ordinary stoppages on the river bars, by days upon days of time spent in cooling down and repairing her boilers, and by her inability to proceed at full speed even when in motion. The rigors of winter and the inevitable laws of the season transformed a river of water into a tract of ice. This vessel and all the other vessels on the Yukon River stopped where they were until half a year should roll around and release them. However much or however little of danger or of loss there was, the facts which led up to it were within the knowledge of the appellee and were without our knowledge when this payment was made. We submit that the whole of this Fifteen Thousand Dollars ($15,000) should be returned to the appellant, and appellant awarded the relief prayed for in its cross-bill.

Wherefore, appellant respectfully prays that this cause be reversed by this Honorable Court for the reasons herein advanced, and that it be awarded the relief prayed for by it.

Respectfully submitted,

IRA BRONSON and D. B. TREFETHEN,

Proctors for Appellant.

F. R. WALL, Of Counsel.